APPENDIX A

[Filed March 1, 2000]

IN THE SUPREME COURT OF IOWA
No. 99-1626
Scott County No. LACV 93484

ORDER

ALVIN LANGFELDT and
MARY LANGFELDT,

Plaintiffs-Appellants,

vs.

GENESIS MEDICAL CENTER,

Defendant-Appellee.

After consideration by this court en banc, Ternus J., not participating, further review of the above captioned case is denied.

Dated this 1st day of December, 2000.

THE SUPREME COURT OF IOWA

By /s/ Louis A. Lavorato
Louis A. Lavorato, Chief Justice

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APPENDIX B

[Filed September 13, 2000]

IN THE COURT OF APPEALS OF IOWA

No. 0-424/99-1626

ALVIN F. LANGFELDT and
MARY LANGFELDT,

Plaintiffs-Appellants,

vs.

GENESIS MEDICAL CENTER,

Defendant-Appellee.

Appeal from the Iowa District Court for Scott County, David H. Sivright, Jr., Judge.

Alvin and Mary Langfeldt appeal the district court's order dismissing their medical malpractice case against Genesis Medical Center for lack of service. **AFFIRMED.**

Mark F. Cyr of the Law Office of Mark F. Cyr, P.C., Rock Island, Illinois, for appellants.

Charles E. Miller and Troy A. Howell of Lane & Waterman, Davenport, for appellee.

Considered by Huitink, P.J., and Mahan and Zimmer, JJ.

HUITINK, P.J.,

I. Background Facts and Proceedings.

This is the second lawsuit Alvin and Mary Langfeldt filed against Genesis Medical Center. Both are prem-

ised on allegations of medical negligence and resulting injury to Alvin while he was undergoing treatment at Genesis in July 1995. Langfeldts' first lawsuit was filed on July 3, 1997. Genesis's motion to dismiss Langfeldts' claims based on a 117-day delay in service of the required original notice was denied. After the district court also denied Langfeldts' motion to sever their claims against Genesis from that made against Alvin's treating physician, Langfeldts voluntarily dismissed their claim against Genesis.

The second lawsuit resulting in these proceedings was filed on January 28, 1999. On June 17, 1999, Genesis moved to dismiss citing Langfeldts' failure, without good cause, to serve Genesis with an original notice within the time required. Langfeldts conceded failure to serve the original notice as required but claimed ongoing settlement negotiations with counsel for Genesis provided good cause for their failure to do so.

The district court rejected Langfeldts' good cause theory stating:

> In this case, Genesis, its insurer, and its attorneys were aware of the Langfeldts' claims as a result of the first lawsuit. Its attorney was furnished a copy of the second lawsuit when it was filed. The Court infers defendant and its insurer were able to timely investigate the claim and prepare its defense. Nonetheless, plaintiffs have failed to show good cause for their failure to serve defendant in this action as required by amended Rule 49(f). The efforts to mediate settlement with Dr. Collins, and thereafter initiate settlement negotiations or mediation of the claim against Genesis, is not a sufficient reason for delaying service. . . . In addition, it was not

defense counsel's duty or obligation to require "formal" service of process upon Genesis.

Genesis's motion to dismiss was accordingly granted.

On appeal, the Langfeldts contend the district court erred in dismissing their claim. They argue the record demonstrates good cause for their failure to timely serve an original notice. They also agree the delay in service of the original notice did not prejudice Genesis.

II. Standard of Review.

We review the district court's granting of a motion to dismiss for errors of law. *Sanford v. Mantemach*, 601 N.W.2d 360, 363 (Iowa 1999).

III. The Merits.

Iowa Rule of Civil Procedure 49(f) provides:

> If service of the original notice is not made upon the defendant, respondent, or other party to be served within 90 days after filing the petition, the court, upon motion or its own initiative after notice to the party filing the petition, shall dismiss the action without prejudice as to that defendant, respondent, or other party to be served or direct an alternate time or manner of service. If the party filing the papers shows good cause for the failure of service, the court shall extend the time for service for an appropriate period.

Good cause means:

> [t]he plaintiff must have taken some affirmative action to effectuate service of process

> upon the defendant or have been prohibited, through no fault of his [or her] own, from taking such an affirmative action. Inadvertence, neglect, misunderstanding, ignorance of the rule or its burden, or half-hearted attempts at service have generally been waived as insufficient to show good cause.

Henry v. Shober, 566 N.W.2d 190, 192-93 (Iowa 1997). A lengthy delay in service is also indicative of a plaintiff who has filed a petition "not to seriously institute litigation, but rather to 'ice' the statute of limitations for a later determination on whether to proceed with suit." *Alvarez v. Meadow Lane Mall Ltd. Partnership*, 560 N.W. 2d 588, 591 (Iowa 1997).

Applying these principles to the undisputed facts in this case, we find the district court properly concluded the Langfeldts' failure to serve an original notice for 140 days was presumptively abusive. *Cf. Turnbull v. Horan*, 522 N.W.2d 860, 861 (Iowa App. 1994) (finding a 126-day delay in service presumptively abusive). We, like the district court, also conclude the Langfeldts failed to show adequate justification for the delay. Settlement negotiations, even if done in good faith, do not constitute adequate justification or good cause for delaying service. *Henry*, 566 N.W.2d at 193.

Finally, we reject Langfeldts' argument that the delay in service did not prejudice Genesis. The point is not whether Genesis suffered prejudice from the delay in service or whether the delay was intentional, but rather whether the Langfeldts can show justification for the delay. *Mokhtarian v. GTE Midwest Inc.*, 578 N.W.2d 666, 669 (Iowa 1998). We additionally note that notice of the possibility of a lawsuit is not sufficient; the party

being sued must be served with an original notice as required by our rules of civil procedure. *Id.*

The Langfeldts have failed to sustain their burden of showing "good cause" for their failure to comply with Iowa Rule of Civil Procedure 49(f). The district court's dismissal of Langfeldts' lawsuit against Genesis is affirmed.

AFFIRMED.

APPENDIX C

[Filed September 15, 1999]

IN THE IOWA DISTRICT COURT
FOR SCOTT COUNTY

ALVIN F. LANGFELDT and MARY LANGFELDT,	)	
Plaintiffs,	)	No. LACE 93484
vs.	)	RULING ON MOTION TO DISMISS
GENESIS MEDICAL CENTER,	)	
Defendant.	)	

Hearing was held on defendant's motion to dismiss, resisted by plaintiffs. Plaintiffs appeared by their attorney, Mark F. Cyr. Defendant ["Genesis"] appeared by its attorney, Charles E. Miller. The Court having reviewed the pleadings, considered counsel's arguments, and taken judicial notice of Scott County case Number LACE 91174, enters the following ruling.

BACKGROUND FACTS

Alvin and Mary Langfeldt seek damages for personal injuries allegedly caused by the negligent medical treatment of Alvin while he was a patient in the Genesis emergency room in July, 1995. The petition was filed January 28, 1999. Defendant has not been served with original notice.

Plaintiffs' first filed this lawsuit against Genesis Medical Center on July 3, 1997. They were then represented by attorney Jorge Gomez, Jr. The hospital was not served with original notice until October 28, 1997, 117 days after the petition was filed. Defendant's motion to dismiss claiming untimely service pursuant to R.Civ.P. 49 was denied; the Court found service was delayed by a "clerical misunderstanding", was unintentional, and was not prejudicial to Genesis.

Attorney Cyr replaced Gomez as plaintiffs' counsel and sought consolidation of plaintiffs' case against Genesis with their separate negligence action against Dr. John Collins. Both Genesis and Dr. Collins were represented by the same law firm. The Court denied consolidation of the claims, finding the two actions sought damages for different alleged failures to provide adequate medical treatment for different periods of time. The Court also denied plaintiffs' motion for a continuance. Plaintiffs thereafter voluntarily dismissed their first case against Genesis.

This action was filed within six months of plaintiffs' dismissal of their first lawsuit against Genesis and is therefore deemed a continuation of the first case.[1] Defendant moves to dismiss the petition in this case, arguing it has again not been timely served with original notice. Defendant relies upon amended R.Civ.P. 49(f), effective January 24, 1998, which allows dismissal of an action if original notice has not been served within 90 days of the filing of the petition, absent good cause for the delay. The burden is on plaintiffs to show good cause.

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[1] See Iowa Code Sec. 614.10.

Plaintiffs argue service of notice upon defendant was withheld to allow time to negotiate or mediate their claims against Dr. Collins and Genesis. Plaintiffs have negotiated a settlement with Dr. Collins, and after the filing of this action, attorney Cyr corresponded with defendant's counsel concerning possible settlement or mediation of plaintiffs' claim against the hospital. There is no showing Genesis waived timely service of process, and plaintiffs have not sought any extension of time to complete service.

RULING

Defendant's motion to dismiss plaintiffs' first lawsuit was decided under Rule 49, which prior to January 24, 1998 did not specify a time within which original notice had to be served upon a defendant. However, an action was subject to dismissal if there was "abusive delay" in the completion of service. *Alvarez v. Meadow Lane Mall*, 560 N.W.2d 588, 591 (Iowa 1997). The Court finds amended Rule 49(f) applies here, regardless of the effect of Iowa Code Sec. 614.10. Plaintiffs were required to commence this action within six months of their voluntary dismissal of the first case to have the filing of the first case toll the statute of limitations, but the commencement of this action is subject to the procedural standards in effect at the time the second petition was filed. See generally *Mokhtarian v. GTE Midwest Inc.*, 578 N.W. 2d 666, 668 (Iowa 1998).

Defendant cites *Henry v. Shober*, 566 N.W.2d 190 (Iowa 1977), which upheld dismissal of a cause of action under Rule 49 when the defendant was not served with original notice for reasons similar to those advanced by plaintiffs here. The court noted:

> *. . . settlement negotiations, even if done in good faith, do not constitute adequate justification or good cause for delaying service. Rule 49 contemplates that when a petition is filed, a defendant should be served promptly. (Citation omitted) The existence of ongoing settlement negotiations is not sufficient reason for delaying service. (Citations omitted). . . .*
>
> If we were to allow delays in service for ongoing settlement negotiations, plaintiffs would have no incentive to serve the defendant within a reasonable time. Further, we did not see how service of the original notice and petition is a hindrance to the settlement process. . . . If the parties wish to continue settlement discussion beyond the limitation period, the plaintiff should secure a statute of limitations extentions, in writing from the defendant and the defendant's insurer. *Id.* at 193. (Emphasis added).

In this case, Genesis, its insurer, and its attorneys were aware of the Langfeldts' claims as the result of the first lawsuit. Its attorney was furnished a copy of the second lawsuit when it was filed. The Court infers defendant and its insurer were able to timely investigate the claim and prepare its defense. Nonetheless, plaintiffs have failed to show good cause for their failure to serve defendant in this action as required by amended Rule 49(f). The efforts to mediate settlement with Dr. Collins, and thereafter initiate settlement negotiations or mediation of the claim against Genesis, is not a sufficient reason for delaying service. *Id.* In addition, it was not defense counsel's duty or obligation to require "formal" service of process upon Genesis.

Now, therefore, **IT IS HEREBY ORDERED** that defendant's motion to dismiss is granted. Costs are taxed to plaintiffs.

Dated this 15th day of September, 1999.

/s/ David J. Sivright, Jr.
David H. Sivright, Jr.

JUDGE OF THE SEVENTH
JUDICIAL DISTRICT OF
THE STATE OF IOWA

APPENDIX D

Iowa Rule of Civil Procedure 49(f) provides:

(f) If service of the original notice is not made upon the defendant, respondent, or other party to be served within 90 days after filing the petition, the court, upon motion or its own initiative after notice to the party filing the petition, shall dismiss the action without prejudice as to that defendant, respondent, or other party to be served or direct an alternate time or manner of service. If the party filing the papers shows good cause for the failure of service, the court shall extend the time for service for an appropriate period.

HISTORICAL NOTES

COMMENT

New R.C.P. 49 is a combination of former R.C.P. 49, 50 and 52 to present the information in a more logical sequence. This rule was changed to reflect the present practice. Original notices should now include the telephone number and facsimile transmission number of the party's attorney requesting the issuance of an original notice. It also requires the original notice to have the proper ADA notice. The language is changed stating a default "may be rendered" rather than "will be rendered." This change reflects the actual practice and the 10-day notice before a default judgment can be entered. The rule also has a 90-day requirement for service. Ninety days was chosen in order that service would be perfected prior to the issuance of scheduling orders by most courts. The form of the original notices contained in appendix are changed accordingly.

APPENDIX E

UNITED STATES CONSTITUTION

Fourteenth Amendment

[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.